No. 86-656

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*,
Petitioners
v.
JAMES ABOUREZK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners
v.
CITY OF NEW YORK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners
v.
BRUCE CRONIN, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE

THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law center with nationwide membership, based in Washington, D.C. WLF engages in

litigation and administrative cases concerning a variety of issues of concern to its membership. One of WLF's primary goals is the preservation and enhancement of U.S. national security. WLF has been especially active in cases involving attempts to impose judicial constraints on the federal government's capacity and authority to protect national security. WLF has appeared as *amicus* in numerous cases before the Court, including *Meese v. Keene*, No. 85-1180, dealing with the enforcement of the Foreign Agents Registration Act.

The Allied Educational Foundation ("AEF"), established in 1964, is a non-profit charitable and educational foundation based in Englewood, New Jersey, and devoted to the expansion of knowledge and education in a broad variety of areas including immigration and foreign affairs issues. AEF appeared along with WLF as amici in *Meese v. Keene*.

Amici seek to ensure that the proper administration of the laws in the sensitive area of foreign affairs by the political branches are not intruded upon by the judiciary. In that regard, while the parties will focus on the merits of the case, *amici* will focus on the justiciable issues of standing and judicial review which this Court has the power and duty to address.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the statement of the case as set forth in the brief of the petitioners.

SUMMARY OF ARGUMENT

Plaintiffs have not satisfied the constitutional or prudential requirements of standing to challenge the decision by a consular officer denying an alien's visa application. Significantly, no showing has been made that the alleged injury to their alleged First Amendment right to

see an alien in person will likely be redressed by this court's opinion on the meaning of the excludability provision of subsection (27) and its relationship with subsection (28) of section 1182(a) of the Immigration and Naturalization Act. This is especially so where the McGovern Amendment does not compel a waiver if subsection (28) were invoked.

Furthermore, *amici* submit that the granting or denial of a visa application is committed to the agency's discretion by law, and that judicial review is precluded. Finally, *amici* submit that the Executive's interpretation of subsection (27)—that the mere presence in the United States of aliens who are affiliated with hostile foreign governments may be prejudicial to the interests of the United States—is reasonable and not arbitrary or capricious.

ARGUMENT

I. RESPONDENTS, AS MERE INVITEES OF AN ALIEN, HAVE NO STANDING TO CHALLENGE THE DENIAL OF THE ALIEN'S VISA APPLICATION REGARDLESS OF THE REASON FOR THE DENIAL.

Article III limits the power of federal courts to hear only justiciable "cases" or "controversies." A litigant must " 'show that he personally has suffered some actual threatened injury as a result of the putative illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (footnote and citations omitted). In addition, the plaintiffs must satisfy the prudential requirements of standing,

> such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the

> requirement that a plaintiff's complaint fall within the zone of interest protected by the law invoked.

Allen v. Wright, 468 U.S. 737, 751 (1984)

The lower court found that plaintiffs "are substantively interested in, and adversely affected by, the Department's interpretation of subsection (27) as it coexists with subsection (28) [and] are . . . at least arguably within the zone regulated by the statute." *Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986). *Amici* submit, however, that the lower court erred on this issue, and that plaintiffs lack standing to invoke the judicial machinery to determine the legality of the Executive's denial of a visa to an alien whom plaintiffs wish to see and hear in person, regardless of the reason for the denial. This is especially so where, as here, the alien himself has no right to seek judicial review of a consular decision denying his visa application. In other words, the unreviewability of a consular decision denying a visa should not be circumvented by merely substituting as plaintiffs who are, at best, indirectly affected by the decision.

For if plaintiffs are found to have standing in this case to challenge the government's refusal to allow a person to visit and speak with them, then any invitor or, for that matter, any person wishing to attend a planned meeting and to associate or speak with the alien invitee, can invoke the judicial machinery to adjudicate the validity of the government's decision. *Cf. Haitian Refugee Center v. Gracey*, —— F.2d —— (D.C. Cir. No. 85-5258) (Jan. 9, 1987) (member of refugee counseling center wishing to associate with Haitians lack article III standing and center itself lacks prudential standing to challenge Executive order and practice of interdicting undocumented Haitians aboard vessels on the high seas). Could the airline which booked passage for the excluded alien, or the hotel where the alien was expected to stay, and which consequently lost the profits due to the can-

cellations caused by the visa denial, sue the State Department to determine the validity of the visa denial? *Cf. Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980)? Could any alien whose visa was denied under any of the 33 grounds in 8 U.S.C. § 1182, have their case adjudicated by a person who simply invited them to the United States?

For example, if the aliens were excluded not on an "ideological" basis as the plaintiffs allege, but on the basis that the alien was "insane", under § 1182(a)(2), or having "one or more attacks of insanity", § 1182(a)(3), or afflicted with a "dangerous contagious disease", § 1182(a)(5), or whatever other reason, the plaintiffs' injury would be the same—they would be prevented by the government from hearing or seeing an alien in person due to the denial of the visa application. The question in that case would be whether that injury to their right to receive ideas entitles the plaintiffs to adjudicate the validity of the government's invocation of "insanity" under § 1182(a)(2). Could the plaintiffs argue, for example, that the grounds of "insanity" under § 1182(a)(2) could not be invoked by the government because the aliens were not really insane, but suffered only one or more attacks of insanity and therefore § 1182(a)(3) could only be invoked? Could the plaintiffs argue that the reasons for invoking § 1182(a)(2) must be "independent of" instead of "in addition to" the reasons under § 1182(a)(3)?

This broadening of the standing doctrine could easily extend beyond the immigration field. For what would prevent a person who wished to speak with or associate with an incarcerated criminal, or invited the criminal to appear before a university audience, television talk show, or other forum, from having standing to adjudicate the lawfulness of the parole board or warden's refusal to release the inmate on parole or temporary furlough? Could such a plaintiff adjudicate the underlying lawfulness of

the inmate's incarceration without the necessity of the inmate invoking habeas corpus or other usual review proceedings to determine the lawfulness of his conviction or continued incarceration? For if the plaintiffs have standing here to adjudicate the government's interpretation of one body of law—in this case, the immigration laws—which prevents an individual from speaking to them in person, then they or any other person has standing to adjudicate the government's interpretation of any other body of law, *e.g.*, criminal law, mental health law, and so forth, which permits the government to deny or prevent one person from meeting another citizen. These concerns also support *amici's* position discussed in Part II that judicial review is precluded, regardless of whether standing can be found.

A. Plaintiffs Have Suffered No Judicially Cognizable Injury-In-Fact Since Their Interest In Hearing or Seeing An Alien In Person Is A Generalized Interest.

In this case, plaintiffs are individuals and organizations interested in hearing the views of various aliens on various topics. While plaintiffs may allege that they have a First Amendment right to receive information and ideas, this is a generalized interest shared by everyone who wishes to receive information from these aliens. Further, this right is not infringed by the nonappearance of the invitee since plaintiffs have ample alternative means of receiving those ideas, through books, literature, and telephonic or satellite hookups that would enable the plaintiffs to receive these ideas and even question the speaker. The only "infringement" is the inability to see, hear and talk to the alien in person.

Respondents, however, rely on *Kleindienst v. Mandel*, 408 U.S. 766 (1972), for the proposition that invitors have standing to litigate the validity of a visa denial. In the first place, the excluded alien in that case, Dr. Mandel, was a plaintiff in that action, whereas none of

the excluded aliens are parties in the instant case. Secondly, "the Court's opinion in [*Mandel*] does not discuss standing and so does not constitute a precedent," *Haitian Refugee Center v. Gracey, supra*, slip op. at 10, although it has been suggested that standing was implicitly found. *Id.* Nevertheless, *amici* submit that this "infringement" is insufficient to satisfy the first prong of article III standing, injury-in-fact. In any event, this alleged injury is not redressable and thus the second constitutional prong of standing has not been satisfied.

B. Plaintiffs Have Failed To Satisfy The Redressability and Causation Prongs of Standing.

It is well settled that in order for a party to have standing, it must be shown that there is a substantial likelihood that plaintiffs' injury will be redressed by a favorable opinion. *Allen v. Wright*, 468 U.S. 737 (1984). Related to the redressibility issue is causation, *i.e.*, whether the named defendants are the cause of plaintiffs' injury. These critical aspects of article III standing, which were never addressed in the court below nor by this Court in *Kleindienst v. Mandel*, are lacking in the instant case.

A careful examination of the facts in this case, as well as the relevant law and procedures governing visa applications, show that even if subsection (27) could not be properly invoked, plaintiffs have not demonstrated that the aliens would otherwise be admissible or admitted into this country. In the first place, the aliens would have to reapply for a visa and the government would have the opportunity to deny the visa applications on any of the other 32 grounds. Assuming that subsection (27) is not invoked by the consular officer, it is clear that all the aliens are members of or affiliated with organizations excludable under subsection 28. Indeed, the record shows that the consular officer found Nino Pasti ineligible for a visa under subsection 28. 785 F.2d at 1048.

Once subsection 28 is invoked, the McGovern Amendment, 22 U.S.C. § 2691, which allows for a waiver of subsection 28, comes into play. But the McGovern Amendment, as well as other waiver provisions found in 8 U.S.C. § 1182(d), do not compel waivers of those aliens excludable under subsection 28. The McGovern Amendment only directs that the Secretary of State "should" recommend a waiver to the Attorney General, who then has the unfettered discretion to grant or deny the waiver. While Judge Bork said below that whether or not the waiver provision of McGovern Amendment is mandatory is "an open question", the language of the statute and legislative history presented by Judge Bork in his dissent clearly shows that the question has been answered.

First, the McGovern Amendment uses the hortatory phrase "should", and not the mandatory "shall". Congress clearly knows the legal significance of each of these two words. In § 1182(d)(3), for example, which concerns the nonapplicability of 30 categories of exclusions, Congress declared that waivers "*may*" be granted. On the other hand, § 1182(h) provides for certain circumstances where waivers "*shall*" be issued. The word "*should*" found in the McGovern Amendment has a meaning that probably falls somewhere between "may" and "shall," but in any event, is not a mandatory command, but at best, a mere expression of congressional preference. Since the langage of the McGovern Amendment is clearly nonmandatory, there is no need to resort to the legislative history. But if the legislative history is examined, further support is found. As Judge Bork correctly observed below:

> In 1978, the Senate voted in favor of amending the provision to substitute the word "shall" for "should," but that revision was dropped at conference and the original language was retained. H.Rep. No. 1535, 95th Cong., 2d Sess. 44 (1978), U.S. Code Cong. & Admin. News 1978 pp. 2424, 2485. In 1979, during a discussion on the House floor over proposed modi-

fications of the McGovern Amendment, Congressman Solarz stated:

> Right now, under the McGovern Amendment, the Secretary of State is obligated to recommend the waiver that they be admitted, unless he believes that admitting them would constitute a threat to the national security of the United States; and if he feels that they will not constitute a threat to the national security of the United States, he is obligated to recommend the waiver.

125 Cong. Rec. 8347 (1979). Congressman Fascell, Chairman of the Subcommittee on International Operations, responded:

> I just want to say that I agree with the explanation made by the gentleman from New York (Mr. Solarz), with one correction: The present language of the law, that is, the McGovern amendment, is not mandatory.
>
> Other than that, Mr. Chairman, I would agree with everything which the gentleman from New York has said.

Id. A bit later, Congressman Solarz indicated his agreement:

> If the gentleman will yield, I want to underline what the subcommittee chairman said, that the McGovern language is not mandatory. The Conferees went to a good deal of trouble to use the word "would," [sic] not "shall," . . .

785 F.2d at 1073.

Since the statute and legislative history is clear, the McGovern Amendment is not mandatory regardless of the desire of the proponents of the McGovern Amendment to implement the Helsinki Accords, and regardless of some letter written by a State Department official suggesting that the amendment limits the Secretary's discretion. 785 F.2d at 1057 (letter of Alvin Paul Drischler).

Secondly, even if a waiver request by the Secretary of State were "mandatory" under the McGovern Amendment, there is no dispute that the statute nevertheless gives *unfettered discretion* to the Attorney General to deny the waiver request. Thus, since the plaintiffs have made no showing that there would be any likelihood that the Attorney General would approve any such waiver, there is, concomitantly, no likelihood that their injury would be redressed. While Judge Bork correctly observed that this interplay between the authority of the Attorney General and the Secretary of State "has unfortunate consequences for the majority's reasoning" since the denial of a waiver remains " 'walled off from any effective challenge' ", *id.* at 1075-1074, the other "unfortunate consequence" of this discretion overlooked by the court below is that the redressability prong of Article III standing is fatally missing.[1]

C. Plaintiffs' Injury Is Not Caused By Any of the Defendants.

Related to the redressability prong of standing is the causation requirement, *i.e.*, is the alleged injury to be redressed caused by the named defendants. In this case,

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[1] Even the Secretary's alleged mandatory duty to recommend a waiver may not be necessarily triggered in this case since the McGovern Amendment further provides that:

> (d) The Secretary of State *may refuse* to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions. 22 U.S.C. § 2691(d) (emphasis added).

It is clear that in the cases of excluded aliens, Tomas Borge from Nicaragua and the women from Cuba, their countries are *not* in substantial compliance with the Helsinki Act . Thus, at best, that leaves only Nino Pasti from Italy who could arguably get past the first hurdle of the waiver procedures of the McGovern Amendment. But even in Pasti's case, plaintiffs are far from satisfying the redressability requirement.

plaintiffs' prayer for relief seeks a declaration that Section 27 is inapplicable and that a visa be issued to the excluded aliens. It is this injunctive relief that is crucial to redressing plaintiffs' injuries.

There is a total of four individual named defendants in these cases before the court: the President, the Secretary of State, the Attorney General and the Director of the Immigration and Naturalization Service. It is clear, however, that while these four named defendants have various responsibilities in the administration of the immigration laws, the actual issuance of visas, which is what plaintiffs ultimately seek, is not under the purview of the President, INS, or the Attorney General. The only remaining named defendant that might be involved in the visa application process is George P. Shultz, the Secretary of State. Yet the Secretary of State is not charged with the responsibility of issuing visas. Congress has declared that only consular officers possess the authority to issue or deny visas. 8 U.S.C. § 1201(a). The Attorney General, for example, can only order aliens to be excluded who have already arrived at our shores, 8 U.S.C. § 1225(c), or order their deportation. 8 U.S.C. § 1251. Visas, *once issued* by the consular officer, can be revoked by the Attorney General or the Secretary of State. 8 U.S.C. § 1201(i). But the issuance of the visa can be made only by the appropriate consular officer who has not been made a party before this Court.

Plaintiffs may argue that any court order directed to the Secretary of State would suffice in this case since the Secretary is superior to the consular officers. However, Congress expressly *excluded* the Secretary of State from exercising any powers, duties, or functions, over the granting or denial of visas. The Secretary of State's powers and duties in the immigration field are found in 8 U.S.C. § 1104. Section 1104(a) states in pertinent part that:

> The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, *except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas* . . . .

8 U.S.C. § 1104(a)(1) (emphasis added).

The only role for certain nonconsular officers of the State Department is the administrative practice of providing "advisory opinions" to the consular officer. 22 C.F.R. §§ 41.130(b), (c). As the name implies, "advisory opinions" are advisory and can be rejected by the consular officer. While pure questions of law are made binding on the consular officer, the consular officer retains the sole discretion in applying the particular facts of each visa application to the law expressed in the opinion. 22 C.F.R. § 41.132(c). *See also* Affidavit of Louis P. Goelz, Deputy Assistant Secretary of State for Visa Services, ¶¶ 4, 8. Joint Appendix at 83.

Accordingly, the plaintiffs lack standing for failing to satisfy the redressability and causation requirements of Article III standing.

D. Plaintiffs Injuries Are Not Within The Zone of Interests Congress Sought To Protect or Regulate By the Statute.

Even if plaintiffs satisfied the Article III standing requirements, standing should be denied for prudential reasons since plaintiffs' injury is not within the zone of interest Congress intended to protect or regulate by the immigration laws. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The entire scheme of the law which mandates the exclusion of 33 categories of aliens is to protect the general welfare and interest of all citizens of this country by keeping those aliens out. If anything, a U.S. citi-

zen who *objected* to the admission of an excludable alien would be more within the zone of interest sought to be protected than a person such as one of the instant plaintiffs who object to the alien's exclusion. *See International Union of Bricklayers and Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985).

As for the zone of interest to be regulated, the law regulates the alien, not the invitee or third party, except in those limited circumstances where Congress expressed its concern of a particular provision's impact on specified third parties, such as employers or relatives. *See* 8 U.S.C. § 1182(a)(14). Plaintiffs do not fall within the zone of interest Congress intended to regulate, merely because they cannot see or hear the alien in person. If plaintiffs were in the zone Congress intended to regulate, so would every other citizen.

II. CONSULAR DECISIONS TO ISSUE OR WITHHOLD NONIMMIGRANT VISAS ARE JUDICIALLY UNREVIEWABLE BOTH BECAUSE OF THE FOREIGN AFFAIRS IMPLICATIONS AND CONGRESS'S FAILURE TO PROVIDE FOR REVIEW OF SUCH DECISIONS.

The exclusion and deportation of aliens fall within that category of policy decisions, which "so far as the subjects are concerned, are necessarily conclusive upon all . . . [the government's] department and officers," including "the judiciary." *The Chinese Exclusion Case*, 130 U.S. 581 (1889). This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953).

Congress has mandated that 33 categories of aliens are "ineligible to receive visas and *shall be excluded* from admission into the United States." 8 U.S.C. § 1182(a) (emphasis added). Lest there be any doubt as to the com-

mitment of the power to exclude aliens to the political departments, Congress has given the President discretion to suspend the entry "of *all* aliens or any class of aliens as immigrants or nonimmigrants . . . ." 8 U.S.C. § 1182 (f) (emphasis added).[2]

Thus, there is no dispute that an alien has neither a constitutional nor statutory right to enter the United States. To be sure, once an alien has found his or her way into this country either through legal or illegal means, procedural and other rights may attach. Nevertheless, the overall legislative scheme of the immigration laws indicates no intention by Congress that visa denials were to be reviewable.

For example, Congress expressly provided for judicial review of deportation orders under 8 U.S.C. § 1105a, and made such procedure the "sole and exclusive procedure" for judicial review. *Id.* That detailed procedure provides, *inter alia*, for the time for filing the petition, § 1105a(1), venue, § 1105a(2), habeas corpus relief, § 1105a(b), and exhaustion of administrative remedies, § 1105a(c). Other parts of the statute are replete with complex and detailed procedural requirements relating to other aspects of the administration of the immigration laws. *See, e.g.*, 8 U.S.C. § 1226.

Yet, in the area of visa denials, Congress could easily have but chose not to provide for any procedures or judicial review. Indeed, even if this Court could order the issuance of the visa to the aliens, it is clear that the issuance of a visa does not entitle the alien to be automatically admitted into this country, but only enables the alien to present himself at the port of entry for inspec-

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[2] The lower court's view that it was not intruding on the conduct of foreign policy because § 1182(f) would allow the President to exclude the four aliens in question here may not be entirely correct unless Tomas Borge, for example, was put into a "class" all by himself. Rather, it is the other provisions of the law that leave to the Executive the power to exclude specific aliens.

tion by immigration officials. *Sague v. United States*, 416 F. Supp. 217 (D.C. Puerto Rico 1976). Thus, once at the port, Congress has given the Attorney General the discretion to exclude the alien if it appears that the alien is excludable under subsection (27), (28), or (29), and may do so on the basis of confidential information. 8 U.S.C. § 1225(c). This provision was certainly not repealed by the McGovern Amendment.[3] The only statutory provision relating to the procedures for the issuance of a visa is found in 8 U.S.C. § 1361 where Congress put the "burden of proof" on the alien "to establish that he is eligible to receive such visa . . . or is not subject to exclusion under any provision of [the Act]." (emphasis added). The four aliens in this case did not even attempt to carry, let alone satisfy, the "burden of proof" Congress placed on them. Furthermore, if the alien fails to establish "to the satisfaction of the consular officer that he is eligible to receive a visa" no visa shall be issued unless "he establishes *to the satisfaction of the Attorney General* that he is not subject to exclusion under any provision of this Act." (emphasis added). Again, no such effort was made, but in any event, the Attorney General retains the discretion to determine whether the alien is excludable.

All of the foregoing demonstrates that Congress committed by law the discretion to the government agencies and officers involved to grant or refuse visa applications. Accordingly, judicial review of the exercise of that discretion is precluded under 5 U.S.C. § 701(a)(1). *Heckler v. Chaney*, 105 S. Ct. 1649 (1985). This is particularly true where the subject matter at hand involves the

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[3] Thus, not only is the McGovern Amendment not mandatory, it also falls short of the mark for it only speaks of the issuance of a visa, not the automatic admission of the alien. While Congress may have intended that admission would be required, the words Congress chose are controlling. Congress is of course free to amend the McGovern Amendment to narrow or eliminate the discretion now enjoyed by the Executive.

sensitive exercise of the President's foreign affairs powers. In that regard, the political question doctrine is implicated since the resolution of this issue would impermissibly involve this Court in areas committed to the political branches of the government. *Baker v. Carr*, 362 U.S. 136, 217 (1962); *Goldwater v. Carter*, 444 U.S. 996 (1979).

In the alternative, *amici* submit that the failure of the Congress to provide for judicial review of the visa process compared to the carefully crafted procedural and review provisions provided for other aspects of the immigration laws, such as deportation, is strong evidence that Congress intended that judicial review be precluded. 5 U.S.C. § 701(a)(2). *See Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

III. THE EXCLUSION OF THE ALIENS UNDER SUBSECTION (27) BECAUSE OF THEIR AFFILIATION WITH CERTAIN FOREIGN GOVERNMENTS WAS PROPER.

Assuming that this Court reaches the merits of the controversy, *amici* submit that it was entirely appropriate for the government to exclude the aliens in question under subsection (27) because of their affiliation with certain foreign governments. Judge Bork below correctly determined that subsection (27) authorizes the exclusion of any alien whose mere presence or entry is considered prejudicial to the interests of the United States. 785 F.2d at 1066 (Bork, J., dissenting). Judge Bork also correctly determined that the reason for exclusion under subsection (27) need not be "independent" of the alien's membership or affiliation with a communist organization under subsection (28), any more than subsection (2) (aliens who are insane) must be independent of subsection (3) (one or more attacks of insanity), or subsection (12) (exclusion of prostitutes) must be independent of subsection (13) (engaging in any immoral sexual act).

The practice of the Executive in excluding aliens under subsections (27) and (28) are to be afforded due deference by the court especially in this highly sensitive area of foreign policy. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

But even if the mere presence of the alien in this country is insufficient to constitute an "activity" under subsection (27) prejudicial to the interests of the United States, *amici* submit that the facts show more than mere presence is involved. The aliens have indicated their desire to meet with certain U.S. Congressmen, the press, and so forth. Thus, regardless of what the alien wants to say at those meetings or what the Congressmen wish to hear, the visible *activity* of meeting or associating with the individuals may signal to other countries certain foreign policy implications because of those aliens' affiliation with hostile foreign governments, *i.e.*, Cuba, the Soviet Union, and Nicaragua. In other words, the mere presence of such an alien in this country may, under other circumstances, go undetected and have no foreign policy consequence. But if the alien who is affiliated with the hostile government is shown in the press meeting with or shaking the hands of certain Congressmen, that visible activity could reasonably be concluded by the government to have adverse foreign policy consequences. Accordingly, it is within the discretion of the Executive to exclude these aliens either under subsections (27) or (28), or both.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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